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No. 80-2055

In the Supreme Court of the United States

OCTOBER TERM, 1980

LETCHER T. WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the provisions of the Surface Mining Control and Reclamation Act of 1977, which require warrantless inspections of surface mining operations, conform to the Fourth Amendment.

2. Whether petitioner's conviction for willfully failing to comply with a cessation order issued by the Department of the Interior should be reversed for alleged violations of his due process rights where petitioner refused to utilize procedures for prompt administrative and judicial review afforded by the Act.

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OPINIONS BELOW

Neither the order of the court of appeals affirming the judgment of conviction (Pet. App. A1-A3) nor the judgment and probation/commitment order of the district court (Pet. App. A4-A7) is reported.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1981. A petition for rehearing was denied on April 3, 1981 (Pet. App. A13). The petition for a writ of certiorari was filed on June 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of failing and refusing to comply with a cessation

order issued by the Department of the Interior's Office of Surface Mining Reclamation and Enforcement (OSM), in violation of 30 U.S.C. (Supp. III) 1268(e) and (f). He was sentenced to one year's imprisonment, all but 30 days of which was suspended in favor of unsupervised probation, and was fined $5,000.

1. The facts leading up to the issuance of the cessation order and petitioner's refusal to comply with it are largely undisputed. On October 20, 1978, David Schindler, a reclamation specialist with OSM, performed a visual inspection of petitioner's strip mining operations. At that time, Schindler observed four separate violations of regulations promulgated pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. III) 1201 *et seq.* In accordance with OSM procedures, Schindler issued a notice of violation, which required that the violations be abated by November 3, 1978 (Pet. 11). The notice of violation expressly stated that administrative review was available and explained how to obtain it (A. 244-245).[1] The notice also warned that failure to abate any of the violations within the time period set would result in the issuance of a cessation order (A. 245).

Two of the violations cited by Schindler were corrected within the abatement period and are not at issue in this case. One of the two remaining violations cited in the notice of violation (Violation No. 4) was allowing organic material and spoil to remain on the downslopes, in violation of 30 C.F.R. 716.2(a)(1). The notice specified that the required remedial action was to pull the trees off the downslope (A. 247). The remaining violation (Violation No. 2) was petitioner's "failure to transport and place spoil in a controlled manner in hollow fills No. 2 and No.3" (A. 246). Again, the notice of violation prescribed the necessary remedial action:

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[1] "A." refers to the appendix filed in the court of appeals.

cessation of end-dumping into the hollow fills, placement of a rock toe in the fill, working the material to the toe of the fill and compacting the material in lifts not to exceed four feet in thickness (*ibid.*).

On November 3, 1978, Schindler returned to the mine site for a follow-up inspection. At that time, he discovered that petitioner had not corrected the two violations described above (A. 58-60). Schindler then prepared a cessation order, based on the two outstanding violations (A. 248-251), which he personally served on petitioner on November 6 (A. 63-64). The cessation order expressly directed petitioner to "cease all mining operations except those operations related to reclamation of previously disturbed areas" (A. 250-251). It also advised petitioner of his right to an appeal and specifically warned that a willful and knowing failure to comply with the order would subject him to criminal prosecution, including imprisonment of up to one year and a fine of up to $10,000 (A. 249).

Schindler agair returned to the site on November 13, 1978. At that time, he observed that coal was still being mined and that the violations that were the subject of the cessation order had not been corrected (A. 64, 66; Pet. 12 ("Defendant Letcher White continued to mine")).

2. On December 15, 1978, the United States filed a one-count information charging petitioner and W.D. Coal Company, which is substantially owned and controlled by petitioner, with wilfully and knowingly refusing to comply with a cessation order, in violation of 30 U.S.C. (Supp. III) 1268(e) and (f).[2] With the exception of a Motion for Discovery and Inspection, which the district court granted in part and denied in part, the district court denied all of

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[2]A superseding information also naming petitioner and the W.D. Coal Company was filed on May 1, 1979 (Pet. App. A10).

petitioner's pretrial motions, including a Motion to Suppress Illegally Obtained Evidence, a Motion to Dismiss for Violation of the Defendant's Fourth and Fifth Amendment constitutional rights, a Motion for Bill of Particulars and a Motion to Dismiss for Abuse of Process (Pet. App. A8-A10). On May 4, 1979, the jury returned a verdict of guilty. The court of appeals affirmed (Pet. App. A1-A3).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of the other courts of appeals. Accordingly, further review is not warranted.

1. Petitioner contends (Pet. 14-15) that the Surface Mining Act's authorization of warrantless inspections of surface coal mine sites violates the Fourth Amendment and that, therefore, the evidence obtained as a result of Schindler's warrantless inspections of petitioner's mine site should have been excluded. The court below correctly rejected this contention.

The present case is controlled by this Court's recent decision in *Donovan* v. *Dewey*, No. 80-901 (June 17, 1981), rev'g *Marshall* v. *Dewey*, 493 F. Supp. 963 (E.D. Wis. 1980), on which petitioner relies (Pet. 15, 19-20). In *Dewey*, the Court upheld Section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. III) 813(a), which authorizes warrantless inspections of underground and surface mines, as within the *Colonnade-Biswell* exception to the Fourth Amendment's warrant requirement. *United States* v. *Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970). In so holding, the Court for the first time made clear (slip op. 11-12) that

> it is the pervasiveness and regularity of the federal regulation that ultimately determines whether a warrant is necessary to render an inspection program reasonable under the Fourth Amendment[;] * * * [and that while] the duration of a particular regulatory scheme will often be an important factor in determining whether it is sufficiently pervasive to make the imposition of a warrant requirement unnecessary[,] * * * if the length of regulation were the only criteria, absurd results would occur.

This Court's decision in *Dewey* thus constitutes explicit recognition that coal mining, including surface coal mining, is a pervasively regulated industry, which comes within the *Colonnade-Biswell* exception to the warrant requirement.[3]

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[3]Stone quarries, the specific segment of the mining indusry involved in *Dewey*, have been regulated only since 1966 (slip op. 11 & n.10). Similarly, the sale of firearms, which was the industry involved in *United States* v. *Biswell, supra*, has been regulated only since enactment of the Gun Control Act of 1968, 18 U.S.C. (& Supp. III) 921 *et seq.* Coal mining, on the other hand—in contrast to the mining industry in general, which is the subject of the Federal Mine Safety and Health Act (see 30 U.S.C. (Supp. III) 802(h))—has long been a pervasively regulated industry. Federal regulation began in 1910, with the formation of the Bureau of Mines (*Youghiogheny and Ohio Coal Co.* v. *Morton*, 364 F. Supp. 45, 47 (S.D. Ohio 1973)), and the coal mining industry has been subject to warrantless federal inspection for 40 years (Federal Coal Mine Safety Act of 1941, ch. 87, 55 Stat. 177, 178). Provision for warrantless inspections was also included in the Federal Coal Mine Safety Act Amendments of 1952, ch. 877, 66 Stat. 692, 693. The industry presently is regulated by the following additional federal statutes: the Clean Water Act, 33 U.S.C. 1251 *et seq.*; the Clean Air Act, 42 U.S.C. (Supp. III) 7401 *et seq.*; the Black Lung Benefits Act of 1972, 30 U.S.C. 901 *et seq.* The industry also has been subject to long-standing regulation by many states. See *In Re Surface Mining Regulation Litigation*, 456 F. Supp. 1301, 1318 (D.D.C. 1978), aff'd in part and rev'd in part on other grounds, 627 F. 2d 1346 (D.C. Cir. 1980).

Moreover, the statutory scheme providing for warrantless inspections under the Surface Mining Act is remarkably similar to that of the Federal Mine Safety and Health Act of 1977, which this Court upheld in *Dewey*. Both begin with detailed congressional findings concerning the need to regulate the respective aspects of the mining industry (30 U.S.C. (Supp. III) 801, 1201, 1202). Both require warrantless inspections of all mines covered by the respective legislation at statutorily prescribed intervals (30 U.S.C. (Supp. III) 813(a) and (i), 1252(e)(1), 1267). Both statutes and the regulations promulgated pursuant to them describe specifically the standards with which a mine operator must comply and to which the inspections are geared (*Donovan* v. *Dewey, supra,* slip op. 11-12; 30 U.S.C. (Supp. III) 1252(c), 1265). Both require the inspector to make follow-up warrantless inspections to ascertain whether previously discovered violations have been corrected (slip op. 2; 30 U.S.C. (Supp. III) 813(a), 1271(a)(3)), and both require the government to conduct an inspection if a miner reports an alleged violation (30 U.S.C. (Supp. III) 813(g), 1271(a)(1)). Moreover, both Acts concern dangerous conditions associated with mining, which easily could be concealed during the time it would take to obtain a warrant (see *Dewey, supra,* slip op. 8)[4], and both statutes provide for prompt administrative decisions (30 U.S.C. (Supp. III) 815(d), 816, 823(d), 1271, 1275, 1276). Finally, like the Mine Safety Act (30 U.S.C. (Supp. III) 818(a)), the Surface Mining Act provides (30 U.S.C. (Supp. III) 1271(c)) that if an operator refuses to allow an inspection, the inspector is required to

[4]The easily concealed hazardous conditions covered by the Surface Mining Act include improper discharges of acid or toxic waste water into ground or surface water systems and improper blasting.

seek an injunction before proceeding.[5] In sum, this Court's conclusion in *Dewey, supra*, slip op. 10-11, is equally applicable here:

> Under these circumstances, it is difficult to see what additional protection a warrant requirement would provide. The Act itself clearly notifies the operator that inspections will be performed on a regular basis. Moreover, the Act and the regulations issued pursuant to it inform the operator of what health and safety standards must be met in order to be in compliance with the statute. The discretion of government officials to determine what facilities to search and what violations to search for is thus curtailed by the regulatory scheme. In addition, the statute itself embodies a means by which any special Fourth Amendment interests can be accommodated.[6]

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[5]The Surface Mining Act contains significant protections against the use of inspections as an instrument of harassment by government officials. The Act limits the purpose of the inspections to ascertaining compliance with the Act and the regulations, 30 U.S.C. (Supp. III) 1252(e)(1); it requires that the inspections be conducted at "reasonable times," 30 U.S.C. (Supp. III) 1267(b)(3); and it limits the geographic scope of the inspections to the mining and reclamation operations and the premises in which records required by the Act are located, 30 U.S.C. (Supp. III) 1267(b)(3). The Secretary has further limited the scope of warrantless searches by providing in his permanent regulations that a search warrant may be required for searches of a building, in contrast to site inspections. 30 C.F.R. 840.12; 30 C.F.R. 842.13. See also 44 Fed. Reg. 15594-15595 (1979). No buildings were searched in the present case.

[6]The lower courts that have considered the first question presented by the petition have upheld warrantless inspection provisions of the Surface Mining Act. See, *e.g., Andrus* v. *P-Burg Coal Co.*, 644 F. 2d 1231 (7th Cir. 1981); *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301, 1317-1319 (D.D.C. 1978), aff'd in part and rev'd in part on other grounds, 627 F. 2d 1346 (D.C. Cir. 1980).

2. Petitioner claims (Pet. 14-21) that his Fifth Amendment rights were violated because he did not receive a hearing before the issuance of the cessation order. This case does not involve issuance of a cessation order immediately upon discovery of an alleged violation, which is authorized by 30 U.S.C. (Supp. III) 1271(a)(2) where the violation "creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources * * *."[7] Rather, it involves a cessation order that was issued only after petitioner had refused to abate two violations of the Act and regulations promulgated pursuant to it within the time stipulated in a notice of violation.

As the court of appeals noted (Pet. App. A3), the Surface Mining Act provides ample opportunity for administrative and judicial review of such notices of violation and cessation orders. An aggrieved mine operator may obtain administrative review by the Secretary of a notice of violation or a cessation order, 30 U.S.C. (Supp. III) 1275(a)(1), including, as a matter of right, a formal hearing under the Administrative Procedure Act, 5 U.S.C. (& Supp. III) 554 (30 U.S.C. (Supp. III) 1275(a)(2)). When review is sought of a cessation order, the Secretary is required to issue a written decision within 30 days of receipt of the application for review. 30 U.S.C. (Supp. III) 1275(b). The mine operator

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[7]In *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, No. 79-1538 (June 15, 1981), slip op. 31-36, the Court upheld the immediate cessation order provisions of 30 U.S.C. (Supp. III) 1271(a)(2) against a Fifth Amendment challenge. The Court also reversed the district court's decision that the five-day period provided in 30 U.S.C. (Supp. III) 1275(c) for the Secretary to respond to requests for temporary relief (see pages 8, 9, *infra*) was too long and overruled the district court's substitution of a 24-hour time limit (slip op. 36-37). The Court also upheld the Act against a number of facial attacks on its constitutionality. See also *Hodel* v. *Indiana*, No. 80-231 (June 15, 1981).

also may request temporary relief "[p]ending completion of the [required] investigation and hearing," 30 U.S.C. (Supp. III) 1275(c), which request the Secretary must "expeditiously" grant or deny. *Ibid.* Where the request is for temporary relief from an order of cessation, the Secretary must grant or deny the request within five days. *Ibid.*

Notices of violation and orders of cessation also are "subject to judicial review [in the district courts] on or before 30 days from the date of such order or decision" under the Administrative Procedure Act standards of review, 30 U.S.C. (Supp. III) 1276(a)(2) and (b). Judicial review is also available from decisions of the Secretary denying temporary relief from cessation orders, 30 U.S.C. (Supp. III) 1276(c). The district courts are empowered to stay notices of violation and cessation orders pending their review. See 30 U.S.C. (Supp. III) 1276(d).

In addition, an operator may request the Secretary to modify, vacate, or extend any notice of violation or cessation order. See 30 U.S.C. (Supp. III) 1271(a)(5). Finally, in order for a cessation order to remain effective for more than 30 days, a hearing at or near the mine site must be held within 30 days of the operator's receiving actual notice of the cessation order. *Ibid.*

As the foregoing statutory scheme makes clear, where a cessation order is issued for failure to comply with a notice of violation, the time for the mine operator to challenge the Act and its implementing regulations begins when he receives the notice of violation. In this case, petitioner deliberately chose not to pursue the Act's administrative remedies, although the notice of violation he received specifically informed him of his opportunity to appeal and warned him that failure to abate the violations would result in the issuance of a cessation order. The only consideration relevant to the question whether the cessation order was properly issued in this case is whether violations described

in the notice of violation had been corrected at the time of Schindler's follow-up inspection. Petitioner nowhere alleges that he had corrected the violations at issue by the time of the reinspection on November 3, 1981, or even by the subsequent reinspection on November 13, 1981.

Consequently, any harm petitioner sustained was not the result of any deficiencies in the statutory review provisions, but, rather, was the result of petitioner's own refusal to avail himself of the procedures provided for by the Act. The adequacy of those procedures thus is not at issue in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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